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No. 81-34

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1981

DORNIER GMBH, a German Corporation, *Petitioner,*

v.

DONALD E. ELLIOTT and EVELYN L. ELLIOTT, individually and as Personal Representatives of the ESTATE OF SCOTT V. ELLIOTT, DECEASED, BUSH AIR, INC., an Alaska corporation, and WIEN AIR ALASKA, INC., an Alaska corporation, *Respondents.*

DORNIER, A. G., and DORNIER GMBH, *Petitioners,*

v.

AVONNA L. SWEANEY, Personal Representative of the ESTATE OF GARY B. ROBERTS, BUTLER AVIATION COMPANY, HOME OIL COMPANY, LIMITED, FIELD AVIATION COMPANY, LIMITED, CLIFFORD L. SHORT, RAY E. FERGUSON, FRANK P. FERGUSON, DON FERGUSON, JOE FERGUSON, DON'S SAFARI FLYING SERVICE, KOTZEBUE FLYING SERVICE, INC., ALASKA CENTRAL AIRWAYS, INC., GEORGE GRANT, and AIRPARTS, INC., *Respondents.*

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BUSH AIR, INC., an Alaska corporation, BUTLER AVIATION COMPANY, HAMILTON AVIATION COMPANY, HOME OIL COMPANY, FIELD AVIATION COMPANY, LIMITED, CLIFFORD L. SHORT, RAY E. FERGUSON, FRANK P. FERGUSON, DON FERGUSON, JOE FERGUSON, DON'S SAFARI FLYING SERVICE, FERGUSON'S FLYING SERVICE, KOTZEBUE FLYING SERVICE, INC., ALASKA CENTRAL AIRWAYS, INC., GEORGE GRANT, and AIRPARTS, INC., *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

BRIEF FOR RESPONDENT SWEANEY IN OPPOSITION

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QUESTIONS PRESENTED

Does this Court have jurisdiction to review the issue below when the highest court of the State of Alaska has rendered neither decision nor final judgment?

Is due process violated by the exercise of jurisdiction over a foreign manufacturer who sold replacement aircraft parts to Alaska customers, contacted and assisted Alaska owners of its aircraft, had a western United States distributor whose territory included Alaska, and extensively advertised its aircraft in Alaska as suitable for conditions prevalent in Alaska, where the crash of its aircraft gave rise to this litigation?

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

BRIEF FOR RESPONDENT SWEANEY IN OPPOSITION

OPINIONS BELOW

Respondent Sweaney adopts the description of the opinions below set forth at page 2 and in the Appendix of the Petition for Certiorari.

JURISDICTION

The order of the Supreme Court of Alaska which Petitioners request this Court to review was entered on March 24, 1981. That order denying discretionary interlocutory review is not a "final judgment or decree" within the meaning of 28 U.S.C. § 1257. The Alaska court has not yet rendered a decision on the issue presented by Petitioners. Dornier is still entitled to an appeal as of right to the state supreme court. Accordingly this Court lacks jurisdiction. This deficiency is analyzed *infra* at pages 6 to 7.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

In addition to the provisions and statutes cited in the Petition, the following relevant provisions are set forth in pertinent part in the Appendix hereto: 28 U.S.C. § 1257(3); Supreme Court Rule 28.1; Alaska Rule of Appellate Procedure 402.

STATEMENT OF THE CASE

A Skyservant aircraft designed, manufactured and sold by Petitioners Dornier crashed near Bethel, Alaska[1] on April 2, 1978. Respondent Sweaney instituted this wrongful death action against Dornier and others on several theories of liability.

Dornier moved to dismiss Sweaney's complaint for lack of personal jurisdiction. The extent and quality of Dornier's contacts with Alaska were the subject of lengthy briefs and supporting affidavits, as well as oral argument, considered by the trial court. Respondents established below that Dornier is a large manufacturer, producing several models of aircraft and distributing them worldwide. Dornier personnel have actively assisted marketing efforts in the United States. *See Elkhart Engineering Corp. v. Dornier Werke,* 343 F.2d 861 (5th Cir. 1965). Throughout the proceedings, Dornier has consistently referred only to its Skyservant, although Respondents showed the presence of at least one other model in Alaska.

Dornier acknowledged one sale of replacement aircraft parts to the Alaska owner of two other Skyservant aircraft. Respondents filed affidavits documenting additional contacts supporting jurisdiction. For example, several sales of replacement parts by Dornier occurred every year from 1973 through 1978, including one sale only two months after the plane crash near Bethel. As early as June 1974, Dornier initiated contact with Alaska Air Service, the first Alaska owner of the accident aircraft, and assigned a factory representative to provide it service and assistance. Dornier also sent technical documents concerning the aircraft to Alaska Air Service in Alaska. The flight manual found with the plane is dated "Edition 15 Feb 74 Rev 3 March 76," indicating it was updated in

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[1]Bethel is the economic hub of the Yukon-Kuskokwim Delta area of Alaska.

1976, two years after the plane reached Alaska. In addition, from February 1977 onward, Dornier furnished technical information to other owners.

During this entire time, Dornier was advertising in aviation publications calculated to reach a worldwide market. Affidavits established these advertisements were widely circulated within Alaska. Dornier's aircraft were described as in use "worldwide" and as well suited to use "under arctic conditions." Dornier advertisements also touted its products as "backed by a worldwide maintenance, logistics and aftersales service."

Dornier also undertook extensive efforts that resulted in Federal Aviation Administration issuance of a type certificate for Skyservant aircraft, necessary for marketing and use of this model aircraft in the United States. In documents submitted to the FAA to obtain certification, Dornier stressed that the Skyservant was specially designed for Arctic and Bush operations. Alaska is the only location in the United States where such conditions exist. Of the 107 Skyservants Dornier sold to nonmilitary customers, 2.8% (three aircraft) were ultimately based in Alaska. Those aircraft were used in Alaska with the knowledge and assistance of Dornier.

Finally, Dornier had a national distributor which sold at least one Skyservant into Alaska prior to the accident, and an authorized West Coast distributor at the the time of the accident. The latter distributorship agreement granted Land-Air Sales & Leasing, Inc. exclusive marketing rights in eight western states, including Alaska. Dornier argued below that this distributorship contract "never went into force" because it was later terminated by Dornier. Dornier's notice of that action to the distributor was mailed six weeks after the crash. It stated the agreement was being terminated effective sixty days after receipt, absent a cure by the distributor of the alleged breach. Dornier failed to show absence of a cure following

the letter of termination. While the distributorship was in effect, it was publicized in at least one journal of general aviation widely circulated in Alaska.

In spite of those numerous contacts, Dornier characterized its relationship with such phrases as "never conducted business within the state," "no agents," "no sales revenue from Alaska," and "no contact with the State of Alaska." It explained in detail the life history of the aircraft that crashed and referred to its unspecified marketing policy as evidence of the unforseeability of Alaska as a situs for litigation.

The Alaska trial court specifically relied on all the contacts brought to its attention in making its ruling. The trial court found Dornier's motion to reconsider to be without merit. Under Alaska law, an appeal may be taken only from a final judgment. Thus Dornier petitioned the Alaska supreme court to undertake discretionary interlocutory review of the personal jurisdiction issue. *See* Alaska Rule of Appellate Procedure 402.

Discretionary review was denied by order dated March 24, 1981, without any expression of opinion on the merits. It is this latter order Dornier seeks to have reviewed. Ninety days from the date of that order expired on June 22, 1981. On that date, Dornier submitted its Petition for Certiorari without an accompanying docket fee.[2] Payment of that fee, and subsequent docketing of the Petition by the United States Supreme Court Clerk, did not occur until July 8, 1981.

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[2]The Petition was defective in other respects as well. It omitted the list of related corporations which Supreme Court Rule 28.1 requires included in the first document filed on behalf of a corporate party to proceedings before the Court. That omission has not yet been corrected.

Further, the Petition requests a writ directed to the wrong court below. Even if the decision below were final, *but see* Section I *infra*, where a state supreme court declines to review a final judgment of a lower court, the writ should be directed to the lower court. *See* Faretta v. California, 422 U.S. 806 (1975).

REASONS FOR DENYING THE WRIT

I. The Issue Dornier Seeks To Have Reviewed Lacks Finality And Is Outside The Jurisdictional Requirements of 28 U.S.C. § 1257 Because The Alaska Court Merely Refused To Grant Discretionary Interlocutory Review Of A Pre-Trial Ruling, Did Not Expressly Or Implicitly Address The Merits Of Personal Jurisdiction And Did Not Foreclose That Issue From Subsequent Review Under Alaska's Procedural Rules.

The Court's appellate jurisdiction is generally limited by 28 U.S.C. § 1257 to a final judgment "rendered by the highest court of a State in which a decision could be had." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476-77 (1975). The reasons for this rule include not only judicial efficiency but the "potential conflict between the courts of two different governments." *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945). "This requirement is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system." *Id.* Four exceptions to the final judgment requirement have evolved, whereby the Court may review the highest possible state court's decision on the merits in the absence of a final judgment. *Cox, supra*, 420 U.S. at 477. Dornier cannot take comfort in any of the four categories because the Supreme Court of Alaska has not decided the personal jurisdiction issue. It has not issued a ruling final in either form or substance.

A threshold requirement of all four *Cox* exceptions is a final pronouncement on the federal issue by the highest possible state court. *Id.* It is clear the Alaska supreme court has not yet rendered a decision on the merits of the personal jurisdiction issue. A petition for review merely requests the supreme court to exercise its discretion to undertake early review of an issue.

Alaska Rule of Appellate Procedure 402(b). Denial of the petition neither expresses an opinion on the merits nor precludes Dornier from subsequent review of the issue through normal appellate channels. The personal jurisdiction question still may be raised on a later appeal of right. *Wolff v. Arctic Bowl, Inc.*, 560 P.2d 758, 763 (Alaska 1977). Thus Dornier in effect seeks a ruling that the Supreme Court of Alaska improperly failed to exercise its discretion in favor of special interlocutory review. When discretionary review is denied but the right exists to apply to the state court for further review, a writ of certiorari is inappropriate. *Costarelli v. Massachusetts*, 421 U.S. 193 (1975).

A second overriding factor in the *Cox* categories is the absence of any other federal issues to be resolved. In footnote 2 of its Petition, Dornier alludes to alleged conflict between Alaska discovery procedure and an international convention regarding the taking of evidence abroad, and implies Supremacy Clause issues.[3] The possibility of piecemeal review of another federal issue is a strong reason to deny certiorari. *Flynt v. Ohio*, 49 U.S.L.W. 4533 (U.S. May 18, 1981); *Cox, supra*, 420 U.S. at 477.

Dornier fails to come within any of the four *Cox* exceptions to the final judgment rule. Indeed, the Supreme Court of Alaska has not rendered a decision or in any way addressed the merits of the personal jurisdiction issue. The Petition must be denied due to this lack of finality and this Court's resultant lack of jurisdiction.

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[3]Dornier's footnote contains misstatements of fact and inaccuracies of law with regard to that second petition for review. Those deficiencies will not be further addressed since the issues raised therein are irrelevant to this Petition apart from their indication of other federal issues.

II. Due Process Requirements Are Clearly Satisfied When Jurisdiction is Asserted Over a Foreign Aircraft Manufacturer Whose Numerous Contacts With Alaska Include the Sale of Replacement Parts To Alaska Customers, Unsolicited Assistance to Alaska Owners of Its Aircraft, Extensive Advertisement in Alaska of its Product, Engagement of a Distributor Whose Territory Included Alaska, and Actual Knowledge That 2.8% of its Commercially Sold Aircraft Were Operated in Alaska.

The trial court's decision was correct. Due process is not offended by requiring Dornier to defend in Alaska when its product caused serious injury in the state and it had the numerous contacts shown below by the Respondents.

The Alaska long-arm statute authorizes jurisdiction over Dornier if its act or omission outside Alaska causes injury in Alaska and either of two additional parameters is satisfied: if solicitation and service activities were carried on in Alaska by or on behalf of Dornier, or if its products, parts and services were used in the state in the ordinary course of trade. Alaska Statute 09.05.015(a)(4)(A)&(B). Both those factors were present at the time of the crash.

The long-arm statute extends jurisdiction as far as possible within the confines of federal due process requirements. *Morrow v. New Moon Homes, Inc.*, 548 P.2d 279, 293 (Alaska 1976). The focus of the due process inquiry is whether the defendant has minimum contacts with the forum state adequate to satisfy notions of fair play and substantial justice.

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-92 (1980).[4]

Dornier approaches its "stream of commerce" argument as if that were the sole test of due process. The stream of commerce theory is only one method of showing minimum contacts adequate to satisfy notions of fair play and substantial justice. *Id.* at 295. In this case there are enough direct contacts that one need not reach the stream of commerce analysis of indirect contacts. Several times every year between 1973 and the date of the crash, Dornier sold parts to Alaskan owners of its aircraft. One such sale occurred within two months of the subject accident. Dornier admitte l actual knowledge its products were being operated in Alaska. Based on that knowledge, it contacted owners of the accident aircraft and provided service and technical assistance. Those sales of its products to Alaskans and contacts with Alaskan owners are direct contacts more than adequate to satisfy due process.

Jurisdiction is appropriate on the basis of the foregoing direct contacts without resort to the stream of commerce theory. If the latter theory alone were utilized, however, due process would still be satisfied. A defendant with no direct contacts with a state is still subject to jurisdiction if its indirect conduct and connections "are such that [it] should reasonably

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[4]Dornier erroneously discusses reasonableness as if it were a distinct test of due process. Reasonableness is not a separate hurdle to jurisdiction after minimum contacts are established, but is merely an alternative phrase to "fair play and substantial justice." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-92 (1980). In addition, Dornier made no showing of any particular difficulty in defending this action. Finally, Dornier's argument ignores the interests of the forum state and the victims of its defective aircraft. *See id.* at 292; Packard v. Cessna Aircraft Co., 366 F. Supp 966 (D. Alaska 1973). The mere existence of a possible alternative forum more convenient to a defendant is not sufficient to divest a local court of jurisdiction. Bach v. McDonnell Douglas, Inc., 468 F. Supp. 521 (D. Ariz. 1979).

anticipate being haled into court there." *Id.* at 297. Dornier has numerous indirect contacts that satisfy that standard.

Under *World-Wide*, a primary consideration is the expectation of the manufacturer with respect to products placed into the stream of commerce. *Id.* at 298. Dornier clearly had the expectation its products would be purchased and used by Alaskans. It had actual knowledge its products were being used in Alaska. It provided parts and took other affirmative steps to facilitate that use.

Dornier engaged in worldwide advertising of the Skyservant aircraft. Those advertisements were calculated to reach Alaska and did so. They touted the fact Dornier's "products are backed by world-wide maintenance, logistics and aftersale service." Dornier provided such service to Alaskan owners of its aircraft. To facilitate use of its aircraft within Alaska, it provided technical information, technical specifications and flight manuals. It assigned a factory representative to Alaskan owners to assist with technical problems and supply needed parts. When replacement parts were necessary, it sold them to Alaskans. It makes no difference where title passes or that Dornier may have sold its goods "F.O.B." *See Oswalt v. Scripto, Inc.*, 616 F.2d 191, 197 n.8 (5th Cir. 1980). Dornier knew the destination of those parts and clearly expected their use in Alaska.

Dornier actively pursued the United States market. It successfully undertook the extensive efforts necessary to obtain an FAA type certificate. This certification was necessary so the Skyservant could be marketed and used in the United States. Its advertisements and the documents submitted to the FAA stressed its suitability for Bush and Arctic operations. The only location where such conditions exist in the United States is Alaska. It had at least two distributors in the United States. The early one was a national distributor who engaged

in extensive nationwide advertising. That distributor sold at least one aircraft into Alaska. Subsequently, a California firm was given an exclusive distributorship for the West Coast. The distributorship agreement specifically stated Alaska was a portion of that territory. When coupled with the accident, these indirect contacts are more than adequate under the stream of commerce theory set forth in *World-Wide.*

The trial court relied on both the direct and indirect contacts in denying Dornier's motion. Dornier continues to ignore these undisputed contacts and utilizes selected portions of *World-Wide* to argue for the opposite result. *World-Wide,* however, did not deal with the manufacturer of a product. The defendants in question were a local distributor and retailer whose activities were confined to a three-state area remote from the forum. Plaintiffs attempted to base jurisdiction *solely* on the occurrence of the accident in the forum state. The Court repeatedly pointed out that there was no activity whatsoever that was directly or indirectly connected with the forum state. There was no advertising reasonably calculated to reach the forum. Nor was there any evidence the distributors had served or sought to serve the forum. 444 U.S. at 289, 295. The Court found jurisdiction inappropriate because there were absolutely no "contacts, ties, or relations" with the forum state. *Id.* at 299. Dornier certainly cannot avail itself of that description. It is consistent with *World-Wide* to subject Dornier to jurisdiction in Alaska.

CONCLUSION

The Petition was not filed in compliance with Court rules. It does not come within the Court's jurisdiction because the Supreme Court of Alaska has not ruled upon the question presented. In the absence of those deficiencies, the Petition still would be inappropriate. It presents no new issues of national importance, but asks the Court to resolve facts unique

to this litigation. It addresses well-established legal principles recently reiterated by the Court. The trial court properly applied those principles in analyzing Dornier's numerous direct and indirect contacts with Alaska.

For all the foregoing reasons, Respondent Sweaney respectfully requests the Court to deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

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Statutes

28 U.S.C. § 1257

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

. . . .

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Rules

United States Supreme Court Rule 28.1

.1. . . . Any document, except a joint appendix or a brief *amicus curiae*, filed by or on behalf of one or more corporations, shall include a listing naming all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of each such corporation. This listing may be done as a footnote.

Alaska Rule of Appellate Procedure 402

(a) **When Available.**

(1) An aggrieved party, including the state of Alaska, may petition the appellate court as provided in Rule 403 to review

any order or decision of the trial court, not appealable under Rule 202, in any action or proceeding, civil or criminal.

(2) A petition for review shall be directed to the appellate court which would have jurisdiction over an appeal from the final judgment of the trial court in the action or proceeding in which it arises.

(b) **When Granted.** Review is not a matter of right, but will be granted only where the sound policy behind the rule requiring appeals to be taken only from final judgments is outweighed because:

(1) Postponement of review until appeal may be taken from a final judgment will result in injustice because of impairment of a legal right, or because of unnecessary delay, expense, hardship or other related factors; or

(2) The order or decision involves an important question of law on which there is substantial ground for difference of opinion, and an immediate review of the order or decision may materially advance the ultimate termination of the litigation, or may advance an important public interest which might be compromised if the petition is not granted; or

(3) The trial court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative tribunal, as to call for the appellate court's power of supervision and review; or

(4) The issue is one which might otherwise evade review, and an immediate decision by the appellate court is needed for the guidance of the lower courts or is otherwise in the public interest.